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# ASSESSING EMPLOYMENT TRIBUNAL AWARDS

## 1. INTRODUCTION

Employment Tribunals have been under scrutiny for many years and the focus during that time has been on cost. IFF Research<sup>1</sup> conducted a study on this topic, entitled *Payment of Tribunal Awards*, for the Department of Business Innovation & Skills (BIS).<sup>2</sup> Released in late 2013, this report provided data reflecting on the employment law reforms passed by the Coalition Government, particularly the procedure for dispute resolution. *Payment of Tribunal Awards* both corroborated and brought into question portions of recent legislative changes.

### A. STUDY PARAMETERS

The sample size consisted of 2,493 claimants in England, Wales and Scotland whose applications were successful (either through a Tribunal hearing or by default judgment) between September 2011 and November 2012. This group was drawn from a sample frame of 4,891 supplied by Her Majesty's Court and Tribunal Service (HMCTS). 1,200 interviews were conducted between 13 May and 13 June 2013 (1,000 in England and Wales; 200 in Scotland).

## 2. PAYMENT OF AWARDS

The adjectives 'vulnerable' and 'precarious' have been used to describe categories of workers. The IFF study does not suggest these are misplaced. Those making claims are most likely (59%) to earn £40,000 or less; only five percent of claimants earned over this amount.<sup>3</sup> There was also a noteworthy finding in the report: 'Those who had been in part-time work prior to filing their claim were less likely to still be in work, with 47% in part-time and 22% in full-time positions, 17% were unemployed, 2% self-employed and 12% not working or looking for work.'<sup>4</sup> The median value of awards obtained was £2600.<sup>5</sup> The study found that forty-nine percent of those seeking £5,000 or more were in the managerial, professional or associate cohort.

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<sup>1</sup> IFF describes itself as 'a full service agency – one of the largest independent research companies in the UK. Established in 1965, [it] conduct[s] high quality strategic research for a wide range of private and public sector clients': [www.iffresearch.com](http://www.iffresearch.com).

<sup>2</sup> IFF Research, *Payment of Tribunal Awards* (London: BIS, 2013) [*Payment of Tribunal Awards*].

<sup>3</sup> *Ibid*, 15.

<sup>4</sup> *Ibid*, 16.

<sup>5</sup> *Ibid*, 22. This finding supports Judge David Latham's (the out-going President of the Employment Tribunal of England and Wales) statement in the *Senior President of Tribunals' Annual Report 2014* (London: 2014) [*Senior President Report*], 66: 'There is a misconception in the political and the business world that high awards are a common feature of Employment Tribunals.'

The report highlighted some points requiring continued attention. Twenty-six percent of those claiming a breach of contract were aged 55 and over.<sup>6</sup> This cohort was also most likely to make a claim based on redundancy and consultation (33%). As well, the number of claims for wages grew since 2008. Forty percent of those making wage claims had worked for an employer for one year or less. Twenty-five percent of those making wage claims were under the age of 30.<sup>7</sup>

## **A. NON-PAYMENT**

The figures regarding employers' refusal to pay revealed a version of competitiveness. An acknowledgement of the importance placed on employing entities, the UK is regulated with an emphasis on businesses' competitiveness. Almost a third of employers refused to pay when tribunals made awards. Businesses were more likely to refuse to pay awards below £5,000 than above (32% as compared with 22%).<sup>8</sup> The figure is high considering that qualification for unfair dismissal was extended to two years when eight percent of such claims were successful.

The most common reason for non-payment was an employer who had become insolvent (37%).<sup>9</sup> About half of these respondents believed that their former employers were carrying on business under a different name. Twenty-nine percent of claimants stated that the employer refused to pay and seventeen percent were unable to locate the employer. The amount of the award factored in: those with awards over £5,000 were more likely to report the employer had become insolvent or ceased trading (46% versus 35% for those with awards below £5,000).

## **B. PAYMENT WITHOUT ENFORCEMENT**

Employers were most likely to pay claims (either fully or partially) for unfair dismissal (61%) without enforcement. Targeting of unfair dismissal as an area for legislative change has been previously criticized.<sup>10</sup> While this study does not confirm anything, it does nothing to undercut continued reproach. Awards under £500 were most likely to be paid without enforcement (55%).<sup>11</sup> Awards over £5000 were slightly more likely to be at least partially paid without enforcement (58%) as compared to awards under £5000 (50%). The study's authors attributed the difference to partial payment.<sup>12</sup> Factors

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, 22.

<sup>8</sup> *Ibid.*, 38.

<sup>9</sup> *Payment of Tribunal Awards*, 37.

<sup>10</sup> K. Ewing and J. Hendy (2012), 'Unfair Dismissal Law Changes--Unfair?' *Industrial Law Journal* 41: 115-121.

<sup>11</sup> *Payment of Tribunal Awards*, 31.

<sup>12</sup> Seventeen percent of the awards over £5,000 had been at least partially paid as compared with eight percent of those under £5,000; *Ibid.*, 31.

increasing the likelihood of payment without enforcement included length of service with the employer<sup>13</sup> and assistance from lawyers.<sup>14</sup>

IFF noted that 64% of those who received help from family or friends obtained payment without enforcement.<sup>15</sup> Though difficult to draw conclusions, this remained a significant finding. It may be that cost has taken legal services out of the reach of many considering the value of the awards. Nevertheless, an increase in the numbers of those who are unaware of their options (discussed below) is foreseeable. As well, those who sought assistance from the Citizens' Advice Bureau (CAB) were almost as likely to obtain any payment without enforcement as those who had no assistance (47% versus 48%).<sup>16</sup>

### **C. PAYMENT BY ENFORCEMENT**

Enforcement is effective insofar as it increases the overall payment rate from fifty-three percent to sixty-four percent of claimants receiving full or partial payment of their awards. There is a notable absence of knowledge amongst claimants: less than half of those surveyed were aware of enforcement options (41%). In England and Wales, forty-eight percent of unpaid claimants pursued enforcement action; the same figure as in 2008.<sup>17</sup> The study also determined that if Government sources were not factored in 'the proportion of awards that [were] honoured by the employer against which they [were] made would be even lower.'<sup>18</sup> It may be that educating workers as to their rights would seem to be contrary to the goals of reducing costs for employers.<sup>19</sup> Viewed in this (cynical) manner, the absence of change in enforcement action is a desired outcome.

## **3. DATA RAISING QUESTIONS REGARDING REFORM PREMISES**

### **A. VEXATIOUS LITIGANTS**

This report offers an important opportunity for analysis of the claims levied in the lead up to recent reforms. The common criticism of those who have opposed employment regulation has been the perceived industry of litigation against employers. These critics cite the need to 'sharply reduce the number of unjustified claims' because 'many claimants who have unfortunately not found a new job have time on their hands and view

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<sup>13</sup> Twenty-nine percent who were fully or partially paid had worked for a year or less. The figure rose to fifty-two percent for those between two and five years of service and seventy-two percent for those in service for over 5 years.

<sup>14</sup> Sixty-one percent of those receiving payment without enforcement used the services of a lawyer: *Payment of Tribunal Awards*, 33.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, 34.

<sup>17</sup> *Ibid.*, 39.

<sup>18</sup> *Ibid.*, 48.

<sup>19</sup> Knowledge of rights lead to increased resort to employment tribunals: A. Pollert (2005), 'The Unorganised Worker: The Decline in Collectivism and New Hurdles to Individual Employment Rights' (2005) *Industrial Law Journal* 34: 217-238, at p.220.

a free employment tribunal as a no cost option on winning an award.<sup>20</sup> *Payment of Tribunal Awards* compels caution in accepting such conclusions. Seventy-two of claimants were employed at the time researchers interviewed them (74% were employed at the time of launching their claim).<sup>21</sup> Fifty-eight percent of those who had been in work at the time of both launching a claim and interview for this study were earning a similar level to that made before the claim.<sup>22</sup> Thirteen percent were working for the same employer at the time of their claim.<sup>23</sup> In fact, only seven percent of claimants had previously made a claim.<sup>24</sup>

## **B. REPRESENTATION OF CLAIMANTS**

*Payment of Tribunal Awards* also indicated some level of support for the argument that Coalition employment regulation reforms also impacted worker-side lawyers.<sup>25</sup> Sixty-seven percent of claimants were likely to seek assistance for an unfair dismissal claim and fifty-seven percent sought assistance from solicitors.<sup>26</sup> For wage claims, claimants were more likely to access free advice through the Citizens Advice Bureau (30%) or Acas (12%).<sup>27</sup> Overall, forty-two percent of claimants had sought advice from legal professionals. Two other findings suggested an emerging concern. Twenty-five percent of claimants sought advice from the Citizens' Advice Bureau, while nineteen percent used family and friends' assistance. The prospect for self-representation seems greater given these figures.<sup>28</sup> Self-representation also means greater demands on resources dependent on government funding which as yet do not seem to be increasing in concert with any foreseeable increase in use. More profoundly, there is notable potential for the spread of misinformation. This may perhaps be the most troubling aspect because an absence of knowledge is a surmountable predicament. There should be discomfort when reading this part of the study when one considers the IFF found those who received assistance from lawyers, unions or informal arrangements 'either before, during or after their initial hearing were more likely to receive payment without needing enforcement (58%)'.<sup>29</sup>

## **4. REFORM PREMISES SUPPORTED BY DATA**

The prospects for small to medium sized employers (SMEs) emerged as a particular concern in reforms encapsulated in the Enterprise and Regulatory Reform Act 2013. This focus was vindicated by the IFF study. While fifty-nine percent of employers in the

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<sup>20</sup> A. Beecroft, *Report on Employment Law* (24 October 2011), p 7.

<sup>21</sup> *Payment of Tribunal Awards*: 15. Fifty-eight percent were in full-time and twenty-six percent in part-time work: *Ibid*, 17.

<sup>22</sup> *Ibid*, 16. Eighteen percent were making more than they previously did. However an equal proportion was earning less.

<sup>23</sup> *Payment of Tribunal Awards*, 17.

<sup>24</sup> *Ibid*, 19.

<sup>25</sup> D. Mangan (2013), 'Employment Tribunal Procedure Reforms to Boost the Economy' *Industrial Law Journal* 42: 409-421, at p 417.

<sup>26</sup> *Payment of Tribunal Awards*, 26.

<sup>27</sup> *Ibid*, 25.

<sup>28</sup> Mr. Justice Langstaff, President of the Employment Appeals Tribunal, has predicted such an increase: *Senior President Report*, 64.

<sup>29</sup> *Ibid*, 6.

private sector are small to medium sized businesses,<sup>30</sup> sixty-eight percent of claims were made against this cohort: thirty-three percent of claimants filed cases against employers with 1 to 9 employees; thirty-five percent against employers employing between 10 and 49 workers; eleven percent against undertakings with 50 to 249 workers.<sup>31</sup>

## **5. IMPACT OF EMPLOYMENT REGULATION**

Since the last survey of this kind in 2008, there has been a marked decline in unfair dismissal claims: fifty percent in 2008 down to thirty-three in 2013. The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (SI 2012/989), which doubled the qualification period for unfair dismissal from one to two years, may have contributed to the decline. The IFF study, as noted above, looked at claims between September 2011 and November 2012. The Order came into effect on 6 April 2012 which may have resulted in an increase in the number of claims just prior to this date (an occurrence witnessed just before the 29 July 2013 coming into force date of the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893)). The decline may be more significant given the possibility of an increase. Ewing and Hendy have questioned the reason for the increase in the qualification period.<sup>32</sup> The Dismissal Order remains significant because it confirms the impact of employment regulation on the number of claims made. The noted decrease in unfair dismissal claims may foreshadow a similar drop in the overall number of claims with respect to the influence of the Tribunal Fees Order.<sup>33</sup>

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<sup>30</sup> BIS, Business Population Estimates for the UK and Regions 2013 (23 October 2013).

<sup>31</sup> *Payment of Tribunal Awards*, 20.

<sup>32</sup> Ewing & Hendy, 116.

<sup>33</sup> Mr. Justice Langstaff has identified a drop in applications of one-third in his 2014 report: *Senior President Report*, 63.